JOHN F. DAVIS, CLERK

Supreme Court of the United States

OCTOBER TERM, 1962

No. 981

MILE ROAD CORP.,

Appellant,

vs.

CITY OF BOSTON,

Appellee.

APPELLEE'S MOTION TO DISMISS.

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Motion.

The appellee in the above-entitled appeal moves that said appeal be dismissed either on the ground that it is not within the jurisdiction of this Court because not taken in conformity to the Rules of this Court, or on the ground that it does not present a substantial federal question, or on both of said grounds.

Statement of Basis of Motion.

(a) The appeal has not been taken in conformity to the Rules of this Court.

The jurisdictional statement filed in this appeal does not, as required by paragraph 2 of Rule 13 of the Rules of this Court, comply in all respects with Rule 15 thereof for that (1) it fails to mention that the opinion below is unofficially reported in 187 N.E. 2d 826; and (2) it fails to state the date the notice of appeal was filed, and the court in which it was filed.

(b) The appeal does not present a substantial federal question of an arbitrary and oppressive exercise of state police power.

Appellant contends (Juris. S. 2–3) that Mass. St. 1962, c. 583, is an arbitrary and oppressive exercise of a state's police power. "As underlying questions of fact may condition the constitutionality of legislation of this character, the presumption of constitutionality must prevail in the absence of some factual foundation of record for overthrowing the statute." *O'Gorman & Young, Inc.* v. *Hartford Fire Ins. Co.*, 282 U. S. 251, 257–258. "The burden is not sustained by making allegations which are merely the general conclusions of law or fact. . . . Facts relied upon to rebut the presumption of constitutionality must be specifically set forth." *Pacific States Box & Basket Co.* v. *White*, 296 U. S. 176, 185.

Contrary to implications in the jurisdictional statement (pp. 2–3), as more fully appears from the respondent's answer, only the facts in the first ten paragraphs of the petition were admitted, and it was upon them and them only that the cause was submitted by the stipulation. So far as the issue of arbitrary and oppressive action is concerned, these facts are meager. The two plans included in the record, particularly when attention is paid to their substantially different scales, make it clear not only that Mass. St. 1962, c. 583, does not relate solely to the appellant's land, but that although that land, considered by itself, is a large tract containing about four million square feet, yet the land described in Mass. St. 1962, c. 583, is a markedly greater area. The record is completely silent as to whether the appellant has the only trash or refuse dump in the area described in Mass. St. 1962, c. 583, and as to what the use or uses are to which the other lands lying within that area are put. For all that appears in

this case, there may be a dense population in the area described in Mass. St. 1962, c. 583. It is submitted that the facts are too meager to present a substantial federal question of arbitrary or oppressive action.

Moreover, "so long as the regulation in question is not shown to be clearly unreasonable and arbitrary, and operates uniformly upon all persons similarly situated in the particular district, the district itself not appearing to have been arbitrarily selected, it cannot be judicially declared that there is a deprivation of property without due process of law, or a denial of the equal protection of the laws, within the meaning of the Fourteenth Amendment." *Reinman* v. *Little Rock*, 237 U. S. 171, 177 (livery stable), followed in *Hadacheck* v. *Los Angeles*, 239 U. S. 394 (brick yard). "Nor is there any valid Federal constitutional objection in the fact that the regulation may require the discontinuance of the use of property . . . . ." *Northwestern Laundry* v. *Des Moines*, 239 U. S. 486, 492 (smoke control). "And where the public interest is involved preferment of that interest over the property interest of the individual, to the extent even of its destruction, is one of the distinguishing characteristics of every exercise of the police power which affects property." *Miller* v. *Schoene*, 276 U. S. 272, 279–280 (cedar trees). In view of these decisions, we submit that the federal question involved is not sufficiently substantial to support the appeal. *Zucht* v. *King*, 260 U. S. 174, 177.

The jurisdictional statement (p. 5) emphasizes that respecting the public necessity of local dumps and the great hardship ensuing to the appellee City from Mass. St. 1962, c. 583, the Supreme Judicial Court of Massachusetts said: "These public considerations are without consequence in the case at bar." This Court will note that the Supreme Judicial Court of Massachusetts immediately went on to say: "The

issue is whether St. 1962, c. 583, is unconstitutional as applied to the plaintiff." What the Supreme Judicial Court of Massachusetts was saying in the sentence the appellant emphasizes and calls incongruous (Juris, S., p. 6) was that in asserting Mass. St. 1962, c. 583, to be unconstitutional as applied to it, the appellant could not rely on the public necessity for dumps or the hardship to the appellee City. When there are competing public considerations, it is for the legislature to determine which shall control. Compare *Miller* v. *Schoene*, 276 U. S. 272, 279. The words "These public considerations are without consequence in the case at bar" thus present no substantial federal question.

(c) The appeal does not present a substantial federal question of a restriction of land use to such an extent as to amount to a taking without compensation.

This Court must consider the effect of Mass. St. 1962, c. 583, and of the permit and assignment, as interpreted by the Supreme Judicial Court of Massachusetts. *Williams* v. *Oklahoma*, 358 U.S. 576, 583. Respecting the permit and assignment that Court said (Juris, S., p. 15): "These were not vested property rights immune from governmental action prospectively effective. The health commissioner's permit was expressly subject to revocation. The assignment of the land as a dumping site could be repealed or amended by a later statute." The appellant is thus incorrect when it asserts (Juris, S., p. 7): "The permits issued to the appellant, as well as the status assigned to its land and flats, are vested property rights . . . ." As for Mass. St. 1962, c. 583, itself, what the Supreme Judicial Court of Massachusetts has held is this: "The act must be construed as an absolute prohibition of dumping in the area where the plaintiff's land is situated. As applied to that land,

the question is whether the act is tantamount to a taking of property without due process of law. While it is agreed that the plaintiff is put out of business as a dump operator, the record does not show that the land cannot be filled and put to other use. There has not, therefore, been a complete deprivation of property so as to be the equivalent of a taking without compensation. See *Reinman* v. *Little Rock*, 237 U. S. 171; *Miller* v. *Schoene*, 276 U. S. 272. In so far as the plaintiff's business has been stopped, there is nothing in the meager facts to overcome the presumption of statutory validity. There is likewise nothing to demonstrate that this is a case where the Legislature is prevented from making a determination that circumstances have become such that a dump should no longer be operated in the area." Juris, S , pp. 14–15.

Pertinent pronouncements of this Court are to be found in *United States* v. *Central Eureka Mining Co.*, 357 U. S. 155, where it is said (p. 168): "Traditionally, we have treated the issue as to whether a particular governmental restriction amounted to a constitutional taking as being a question properly turning upon the particular circumstances of each case. . . . In doing so, we have recognized that action in the form of regulation can so diminish the value of property as to constitute a taking. . . . However, the mere fact that the regulation deprives the property owner of the most profitable use of his property is not necessarily enough to establish the owner's right to compensation." Compare *Clarke* v. *Haberle Brewing Co.*, 280 U. S. 384, 386, where this Court tersely stated: "when a business is extinguished as noxious under the Constitution the owners cannot demand compensation from the Government", and *Mugler* v. *Kansas*, 123 U. S. 623; 668–669, to the effect that "A prohibition

simply upon the use of property for purposes that are declared, by valid legislation, to be injurious to the health, morals, or safety of the community, cannot, in any just sense, be deemed a taking or an appropriation of property for the public benefit."

On this branch of the case, it must be emphasized that Mass. St. 1962, c. 583, does not result in acquisition of title or occupancy by government. Governmental action short of acquisition of title or occupancy amounts to a taking only "if its effects are so complete as to deprive the owner of all or most of his interest in the subject matter." *United States* v. *General Motors Corp.*, 323 U. S. 373, 378. Since Mass. St. 1962, c. 583, only prohibits dumping, it obviously does not deprive the appellant of all or most of its interest in the land. Cases cited by the appellant (Juris. S., pp. 7-9) are readily distinguishable as involving direct invasions of an owner's domain. *Pumpelly* v. *Green Bay Co.*, 13 Wall. 166 (flooding of land). *United States* v. *Lynah*, 188 U. S. 445 (flooding of land). *Manigault* v. *Springs*, 199 U. S. 473 (flooding of land). *Richards* v. *Washington Terminal Co.*, 233 U. S. 546 (intrusion of smoke and gases). *Peabody* v. *United States*, 231 U. S. 530 (gunfire over land). *Portsmouth Harbor Land & Hotel Co.* v. *United States*, 260 U. S. 327 (gunfire over land). *United States* v. *Causby*, 328 U. S. 256 (frequent, low flight of aircraft over land). *Griggs* v. *Allegheny County*, 369 U. S. 84 (similar flight of aircraft). The decision in *Pennsylvania Coal Co.* v. *Mahon*, 260 U. S. 393, was due to the acquisition of only surface rights without the right of support. See p. 415. Nor does the case at bar resemble *Panhandle Eastern Pipe Line Co.* v. *State Highway Commission*, 294 U. S. 613, where a highway commission ordered transmission lines in private ways relocated without compensation to permit construction of a new highway.

Conclusion.

Appellee's motion to dismiss should be granted, and the appeal dismissed.

Respectfully submitted,

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